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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE JOHNSON,

Defendant and Appellant.

D051718

(Super. Ct. No. SCD204434)

APPEAL from a judgment of the Superior Court of San Diego County, William H. Kennedy, Judge. Affirmed.

A jury convicted George Johnson of selling cocaine base (Health & Saf. Code, § 11352, subd. (a)¹; Pen. Code, § 1203.073, subd. (b)(7)) and possessing cocaine base for sale (§ 11351.5). In addition, the trial court found true allegations Johnson had two prior convictions for selling drugs and one prior conviction for possessing drugs for sale. (§ 11370.2, subd. (a); Pen. Code, § 1203.07, subd. (a)(11).) The trial court also found true allegations Johnson had three prior probation denial convictions (Pen. Code, § 1203,

¹ Further unspecified statutory references are to the Health and Safety Code.

subd. (e)(4)) and three prior prison convictions (Pen. Code, §§ 667.5, subd. (b), 668). The trial court sentenced Johnson to an aggregate term of 11 years in prison, consisting of a four-year term for the selling cocaine base conviction, plus two 3-year terms for the two prior drug sale convictions, plus a one-year term for one of the prior prison convictions. The court struck the remaining enhancement allegations related to the selling cocaine base conviction. The court stayed the sentences for the possession for sale conviction and related enhancement allegations.

Johnson appeals, requesting we independently review sealed police personnel and internal affairs files to determine whether the trial court abused its discretion in finding the files did not contain any discoverable information. In addition, he contends his conviction for possession of cocaine base for sale should be reversed because this crime is punished more severely than possession of cocaine for sale, which violates his constitutional rights to equal protection and substantive due process. We affirm the trial court's judgment.

I

Working undercover, San Diego Police Detective Michael Day approached a group of people standing on the street and, using street slang, asked to buy \$20 worth of cocaine base. When no one responded, Day walked away. As he did so, Johnson called out to him and waved him over. Johnson asked Day what he wanted and Day, once again using street slang, asked to buy \$20 worth of cocaine base. Johnson told Day he did not have any, but could get some for him. Johnson also told Day that he had to give him the money for the drugs because the seller would not know Day. Day gave Johnson two

prerecorded \$10 bills and Johnson gave Day two disposable cameras as collateral for the money. The two walked over to a group of men and Johnson approached one of them and asked him for the drugs. The man spit out an off-white substance into his hand and showed it Johnson and Day. Day recognized the substance as cocaine base.

Johnson and the man walked away from Day. Fifteen to 20 seconds later, Johnson returned to Day and gave him a piece of cocaine base. Johnson and Day then walked away from the group of men and Day signaled through a one-way transmitter that a sale had been completed. Uniformed officers subsequently arrested Johnson and the man who had provided Johnson with the cocaine base. Each man possessed one of the prerecorded \$10 bills.

II

A

Johnson filed a pretrial motion for discovery of, among other items, the San Diego Police Department's personnel and internal affairs files relating to complaints of false reporting by Day.² The trial court granted the motion, conducted an in camera review of Day's personnel and internal affairs files, and determined the files contained no discoverable information. The transcript and the files have been made part of the record on appeal; however, they are sealed and Johnson's appellate counsel has not been permitted to view them. Johnson requests that this court independently review the

² Johnson also sought similar records for the other officers involved in his arrest. The trial court denied the motion as to these officers and Johnson is not challenging this portion of the trial court's ruling.

transcript and the files to determine whether the files contain discoverable information. The Attorney General does not object to Johnson's request. After conducting the requested independent review, we conclude that the trial court did not abuse its discretion when it determined the files did not contain discoverable information. (*People v. Hughes* (2002) 27 Cal.4th 287, 330; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535.)

B

Johnson contends the disparate sentencing ranges for possession of cocaine base for sale (§ 11351.5) and possession of cocaine for sale (§ 11351) violate his constitutional rights to equal protection and substantive due process because cocaine base and cocaine are both cocaine and different penalties may not be imposed for the same crime. Therefore, he contends his conviction for possession of cocaine base for sale should be reversed. We find no merit to this contention.

Possession of cocaine base for sale is punishable "by imprisonment in the state prison for . . . three, four, or five years." (§ 11351.5.) Possession of cocaine for sale is punishable "by imprisonment in the state prison for two, three, or four years." (§ 11351.) To succeed on his equal protection claim, Johnson must show the statutes classify two or more similarly situated groups unequally and there is no reasonably conceivable rational basis for the unequal classification. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199-1201; see also *People v. Wilkinson* (2005) 33 Cal.4th 821, 837-838; *People v. Ward* (2008) 167 Cal.App.4th 252, 258.) To succeed on his substantive due process claim, Johnson must show the disparate sentencing ranges are not reasonably related to a proper

legislative goal. (*Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1125; *People v. Santos* (2007) 147 Cal.App.4th 965, 978.)

Johnson has not shown that a person guilty of possessing cocaine base for sale is similarly situated to a person guilty of possessing cocaine for sale because he has not shown cocaine base is the same as other forms of cocaine. Courts have long recognized cocaine base is chemically different from other forms of cocaine. (See *People v. Ward, supra*, 167 Cal.App.4th 252, 259; *People v. Howell* (1990) 226 Cal.App.3d 254, 260-261; *People v. Adams* (1990) 220 Cal.App.3d 680, 686-687.) Larry Dale, a narcotics and alcohol analyst with the City of San Diego Crime Lab, confirmed this difference at trial. He testified that cocaine base is derived from powder cocaine, is chemically unique, and cannot be dissolved in water like other forms of cocaine.

In addition, the method of administering cocaine base differs from other forms of cocaine. Cocaine base can only be smoked while other forms of cocaine can be snorted, ingested, and, less commonly, injected. (*People v. Howell, supra*, 226 Cal.App.3d p. 260; see also *Kimbrough v. U.S.* (2007) ___ U.S. ___ [128 S.Ct. 558, 566] (*Kimbrough*); United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Feb. 5, 1995), ch. 2, pp. 18-19 (1995 Report), as directed by Pub.L. 103-322, § 280006, 108 Stat. 1796, 2097 (Sept. 13, 1994); United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 6, 2002), ch. 2, at pp. 18-19 (2002 Report).) This difference is particularly notable because the method of administration determines how quickly the user feels its physiological and psychotropic effects. A user who smokes cocaine base feels the

maximum effects of the drug within one to two minutes.³ A user who snorts powder cocaine feels the maximum effects of the drug within 20 to 40 minutes. (1995 Report, *supra*, ch. 2, at p. 17; 2002 Report, *supra*, ch. 2, at pp. 18-19.) The method of administration also affects the likelihood of psychological dependence. A person who smokes cocaine base is more likely to become psychologically dependent on the drug and administer the drug in binges than a person who uses other forms of cocaine. (1995 Report, *supra*, ch. 2, at p. 18-19; 2002 Report, *supra*, ch. 2, at pp. 18-19.)

Lastly, cocaine base and other forms of cocaine differ in their utility. Under the California Controlled Substances Act, cocaine base is categorized as a Schedule I drug. (§ 11054, subd. (f)(1); *People v. Howell*, *supra*, 226 Cal.App.3d 254, 260-262; *People v. Adams*, *supra*, 220 Cal.App.3d 680, 685.) All other forms of cocaine are categorized as Schedule II drugs. (§ 11055, subd. (b)(6); *People v. Howell*, *supra*, at pp. 260-262; *People v. Adams*, *supra*, at pp. 685-686.) Schedule I drugs have a high potential for abuse, no currently accepted medical use in treatment in the United States, and no accepted safety for use under medical supervision. (*People v. Sherman* (1997) 57 Cal.App.4th 102, 105; 2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Public Peace and Welfare, § 64, p. 573.) Schedule II drugs also have a high potential for abuse, but have a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions. (2 Witkin &

³ A user who injects a solution of powder cocaine and water will feel the maximum effects quickly as well, but few powder users inject the drug. (1995 Report, *supra*, ch. 2 at p. 7; *Kimbrough*, *supra*, 128 S.Ct. at p. 566, fn. 5.)

Epstein, *supra*, at p. 574.) Accordingly, while other forms of cocaine have some legitimate uses, cocaine base does not.

Even if Johnson had shown that cocaine base is the same as other forms of cocaine, Johnson has not shown that there is no reasonably conceivable rational basis for the disparate sentencing ranges or that the disparate sentencing ranges are not reasonably related to a proper legislative goal. Other courts considering the issue have concluded increased penalties for cocaine base offenses are not unreasonable or irrational because cocaine base is more addictive and has greater marketability than other forms of cocaine. (See *People v. Ward*, *supra*, 167 Cal.App.4th at pp. 260-261; *U.S. v. Harding* (9th Cir. 1992) 971 F.2d 410, 413-414; *U.S. v. Thomas* (4th Cir. 1990) 900 F.2d 37, 39.) In addition, the United States Sentencing Commission (Commission) determined cocaine base offenses are more likely to involve weapons or bodily injury and are associated with higher levels of crime. (See 2002 Report, *supra*, ch. 8, pp. 92-94, 100-102.) Moreover, Day testified at trial that the insolubility of cocaine base creates challenges for law enforcement officers trying to combat street-level drug dealing because dealers can conceal cocaine base in their mouths and swallow the cocaine base if law enforcement officers stop to investigate. All of these characteristics of cocaine base provide a rational basis for penalizing possession of cocaine base for sale more severely than possession of cocaine for sale.

Johnson contends we should disregard the above authorities because they are outdated. He contends newer authorities have recognized increased sentences for cocaine base offenses cannot be justified by qualitative differences between cocaine base and

other forms of cocaine. Johnson relies specifically on the *Kimbrough* case and the 1995 Report; however, neither authority supports his position.

In *Kimbrough*, the United States Supreme Court held that a former requirement⁴ in the United States Sentencing Guidelines to treat every gram of cocaine base as 100 grams of powder cocaine was not mandatory, but merely advisory in light of the court's decision in *United States v. Booker* (2005) 543 U.S. 220, 244. (*Kimbrough, supra*, 128 S.Ct. at p. 564.) In reaching this decision, the high court did not address the general propriety of harsher sentences for cocaine base offenses or the specific propriety of the 100-to-1 ratio. Although the court discussed the history of 100-to-1 ratio and noted the Commission has recommended Congress reduce the ratio, the court also noted that the Commission does not advocate identical treatment of cocaine base and powder cocaine offenses. Instead, the Commission recognizes some difference in penalties is warranted because cocaine base is more problematic than other forms of cocaine. (*Kimbrough, supra*, at pp. 568-569; see also 2002 Report, *supra*, ch. 8, pp. 92-94, 100-102.) The court's observations support, rather than undermine, our conclusion that there are conceivable rational reasons for penalizing possession for cocaine base for sale more severely than possession of cocaine for sale.

The 1995 Report also supports this conclusion. While the report criticizes the 100-to-1 ratio, the report does not recommend an alternative. More importantly, the

⁴ The Commission modified the requirement in November 2007 after the defendant in *Kimbrough* had been sentenced. (*Kimbrough, supra*, 128 S.Ct. at p. 569.)

report notes, as have the Commission's more recent reports, that cocaine base is more problematic than other forms of cocaine for the reasons previously discussed. (1995 Report, *supra*, ch. 8.)

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

HALLER, J.